Supreme Court, U.S.
FILED
AUG 27 2004
OFFICE OF THE CLERK

(2)

No. 03-1485

In the Supreme Court of the United States

ROBERT B. MCCLOY, JR., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
WENDY M. KEATS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Horse Protection Act, 15 U.S.C. 1821 *et seq.*, was enacted to prevent the practice of "soring" horses, by deliberately making their feet sore through the use of chemicals, burns, or lacerations, to alter their gait and enhance their performance in horse shows and exhibitions. The question presented in this case is:

Whether the United States Department of Agriculture reasonably found petitioner liable under the Horse Protection Act, 15 U.S.C. 1824(2)(D), for "allowing" the entering in a horse show of one of his horses that had been "sored."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Baird v. *USDA*, 39 F.3d 131 (6th Cir. 1994)	10, 16, 17, 18
Burton v. *USDA*, 683 F.2d 280 (8th Cir. 1982)	10, 15, 16, 17
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	12
Crawford v. *USDA*, 50 F.3d 46 (D.C. Cir.), cert. denied, 516 U.S. 824 (1995)	*passim*
Lewis v. *Secretary of Agriculture*, 73 F.3d 312 (11th Cir. 1996)	10, 15, 16, 17, 18
SEC v. *Zandford*, 535 U.S. 813 (2002)	9, 15
Stamper v. *Secretary of Agriculture*, 722 F.2d 1483 (9th Cir. 1984)	16, 17
Thornton v. *USDA*, 715 F.2d 1508 (11th Cir. 1983)	3
United States v. *Mead Corp.*, 533 U.S. 218 (2001)	9

Statutes and regulations:

Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890	4
Horse Protecton Act, 15 U.S.C. 1821 *et seq.*	2
15 U.S.C. 1821(3)	2, 3, 5
15 U.S.C. 1823(c)	5
15 U.S.C. 1824	4
15 U.S.C. 1824(2)	2-3
15 U.S.C. 1824(2)(A)	8, 9
15 U.S.C. 1824(2)(B)	8, 9

Statutes and regulations—Continued: Page

15 U.S.C. 1824(2)(C) 8, 9
15 U.S.C. 1824(2)(D) 6, 8, 9, 11, 14, 15
15 U.S.C. 1824(3) 5
15 U.S.C. 1825 4
15 U.S.C. 1825(a)(1) 4
15 U.S.C. 1825(a)(2)(A) 4
15 U.S.C. 1825(b)(1) 4, 10, 15
15 U.S.C. 1825(b)(2) 11
15 U.S.C. 1825(b)(4) 10
15 U.S.C. 1825(c) 4, 10
15 U.S.C. 1825(d)(5) 3, 13
15 U.S.C. 1828 4
7 C.F.R. 3.91(b)(2)(vii) 4
9 C.F.R.:
Section 11.1 14
Section 11.7 5
Section 11.20 5

Miscellaneous:

H.R. Rep. No. 1597, 91st Cong., 2d Sess. (1970) 2
H.R. Rep. No. 1174, 94th Cong., 2d Sess. (1976) 2, 3, 13
1 *Oxford English Dictionary* (2d ed. 1989) 10-11
USDA, *Horse Protection Operating Plan* (2004-2006) <http://www.aphis.usda.gov/ac/hpainfo.html> 14
Webster's Third New International Dictionary (1971) 7, 12

In the Supreme Court of the United States

No. 03-1485

ROBERT B. MCCLOY, JR., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 351 F.3d 447. The decision and order of the Judicial Officer of the United States Department of Agriculture (USDA) (Pet. App. 15a-110a, 111a-112a) are unreported. The decision and order of USDA's administrative law judge (Pet. App. 113a-131a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2003. A petition for rehearing was denied on February 3, 2004 (Pet. App. 132a-133a). The petition for a writ of certiorari was filed on April 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Horse Protection Act (HPA or Act), 15 U.S.C. 1821 *et seq.*, to end the cruel practice of deliberately "soring" horses, usually Tennessee Walking Horses, for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, either by applying chemicals or by making cuts, burns, or lacerations, see 15 U.S.C. 1821(3), "the intense pain which the animal suffer[s] when placing his forefeet on the ground [will] cause him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking Horse. H.R. Rep. No. 1597, 91st Cong., 2d Sess. 2 (1970). Congress had three reasons for prohibiting that practice. First, soring inflicts great pain on the horse. Second, owners and trainers who sore their horses gain an unfair competitive advantage over those who rely on skill and patience. Third, by encouraging the breeding of horses who are champions as a result of soring rather than natural ability, the practice can ultimately damage the integrity of the breed. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4 (1976).

The HPA prohibits a number of practices with respect to "any horse which is sore." 15 U.S.C. 1824(2). As relevant here, it prohibits:

> The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity

> described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. 1824(2).

The incentives for horse owners to evade these prohibitions are powerful. Soring can artificially create a high-stepping gait in an otherwise mediocre horse, who then "competes unfairly with a properly and patiently trained sound horse with natural championship ability." H.R. Rep. No. 1174, *supra*, at 4. "Horses that attain championship status are exceptionally valuable as breeding stock," but "if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved," which will then drive down the value of properly bred and trained champions and only increase the incentives for soring. *Ibid.*

Thus, when Congress determined in 1976 that this cruel and destructive practice "continued on a widespread basis" despite the enactment of the HPA, H.R. Rep. No. 1174, *supra*, at 4-5, it strengthened the Act. Congress increased USDA's enforcement authority and resources, *id.* at 6-11, and it added a new sanction—disqualification—specifically meant to deter offenses by "individuals who have the economic means to pay civil penalties as a cost of doing business," *id.* at 11. The 1976 amendments made three further things clear. First, the government need not prove that the owner (or trainer) intended to make a horse sore for the purpose of affecting its gait. 15 U.S.C. 1821(3); H.R. Rep. No. 1174, *supra*, at 2; see *Thornton* v. *USDA*, 715 F.2d 1508, 1511-1512 (11th Cir. 1983). Second, the horse is presumed to be "sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. 1825(d)(5); H.R. Rep. No. 1174, *supra*, at 2. Third, proof of knowledge of the

soring is required for criminal, but not for civil, liability. Compare 15 U.S.C. 1825(a)(1) with 15 U.S.C. 1825(b)(1); see *Crawford* v. *USDA*, 50 F.3d 46, 48 & n.2 (D.C. Cir.), cert. denied, 516 U.S. 824 (1995).

The Act provides for both civil and criminal penalties for persons who engage in prohibited acts with regard to a horse that is sore. 15 U.S.C. 1825. Persons found in violation of the HPA are subject to civil penalties of up to $2000 for each violation, and may be disqualified from showing horses for a period of at least one year, increasing to five years for a subsequent violation. See 15 U.S.C. 1825(b)(1) and (c); 7 C.F.R. 3.91(b)(2)(vii) (adjusting civil penalties upward to $2200 in accordance with Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890). Persons who knowingly violate Section 1824 are subject to criminal penalties of up to one year of imprisonment and a $3000 fine for a first offense, and up to two years of imprisonment and a $5000 fine for subsequent criminal violations. See 15 U.S.C. 1825(a)(1) and (a)(2)(A). The Act authorizes the Secretary "to issue such rules and regulations as he deems necessary to carry out the provisions of [the Act]." 15 U.S.C. 1828.

2. In 1995, petitioner purchased a Tennessee Walking Horse named Ebony's Threat's Ms. Professor (Missy). Pet. App. 3a. Petitioner's first trainer had difficulty getting the horse to canter. *Id.* at 52a. Therefore, in 1997, petitioner placed Missy with Ronal Young, a trainer at a stable in Lewisburg, Tennessee, which was hundreds of miles from petitioner's residence and place of business. *Ibid.*[1] Petitioner testified that he

[1] Young previously had been cited for violating the HPA, although petitioner did not know of that citation and was unaware of how to check Young's record. Pet. App. 55a.

instructed Young not to sore the horse, observing that "[t]here was no need to sore the horse," *id.* at 87a-88a, and Young stated in an affidavit that petitioner had "advised [him] to refrain from soring his horse," *id.* at 97a; see *id.* at 99a-100a (letter from another trainer). But petitioner otherwise "did not maintain control over the training methods which he expected Ronal Young to select and employ when training Missy." *Id.* at 55a; see *id.* at 3a, 90a-91a. Petitioner made unannounced visits to Young's stables and never found Missy sored, *id.* at 54a-55a, but the USDA Judicial Officer found that petitioner's visits "would not have prevented soring," *id.* at 96a.

Missy was entered in the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on September 4, 1998. Pet. App. 3a, 53a. Two Designated Qualified Persons (DQPs) hired by the show inspected Missy and disqualified her from participating on the ground that she was sore. *Ibid.*[2] Two veterinarians from the Animal and Plant Health Inspection Service (APHIS), an agency of USDA, also examined Missy and determined that she was sore within the meaning of the HPA, 15 U.S.C. 1821(3). Pet. App. 3a, 53a-54a. Petitioner, who attended the show to watch two of his other horses, was not aware that Missy was at the show or was entered to be shown, and learned of Missy's disqualification while watching the show in the stands. *Id.* at 3a, 54a. When petitioner confronted Young the next day, Young did not deny responsibility. *Id.* at 54a, 117a. Petitioner nevertheless

---

[2] Horse shows employ DQPs to inspect horses to ensure compliance with the Act and thereby to avoid liability under the Act for the show's managers. See 9 C.F.R. 11.7, 11.20; 15 U.S.C. 1823(c), 1824(3).

continued to employ Young to board, train and show Missy for approximately six more months after this soring incident. *Id.* at 56a. During those subsequent six months, Missy was shown twice, *id.* at 60a, and petitioner examined her himself both times, *id.* at 94a.

3. APHIS filed an administrative complaint on May 4, 1999, charging petitioner with violating the HPA, 15 U.S.C. 1824(2)(D), by allowing Missy to be entered in the Shelbyville show, where she was found to be sore. Pet. App. 4a. The administrative law judge (ALJ) found that petitioner had violated the Act and assessed a civil penalty in the amount of $2200. *Id.* at 113a-131a.

On administrative appeal, the Judicial Officer agreed with most of the ALJ's findings of fact, Pet. App. 17a, 52a-56a, and held that petitioner had violated the Act. The Judicial Officer accepted, as credible, petitioner's testimony that he had orally instructed Young not to sore the horse, and found that the instruction was not rendered less "genuine" by the fact that petitioner continued to leave the horse in Young's care after the soring incident. *Id.* at 91a, 93a. The Judicial Officer further found that the evidence established that although petitioner did not know in advance that Young had entered Missy in the Shelbyville show, petitioner did not object to his trainers, including Young, entering Missy in 25 previous shows and exhibitions, and petitioner did not contend that he did not allow Young to enter Missy in the Shelbyville show. *Id.* at 60a.

Under these circumstances, the Judicial Officer concluded that petitioner "cannot escape liability for a violation of [15 U.S.C. 1824(2)(D)] based on his credible testimony that * * * he did not have actual knowledge that Ronal Young would enter Missy in the show or based on his credible testimony that he instructed Ronal Young not to sore Missy." Pet. App. 61a. In so

concluding, the Judicial Officer found petitioner liable under the analysis approved by the D.C. Circuit in *Crawford*, 50 F.3d at 50-52, see Pet. App. 68a, as urged by APHIS on the administrative appeal, see *id.* at 106a. Under *Crawford*, a horse owner is liable for "allow-[ing]" entry of a sore horse if the owner permits such entry "by neglecting to restrain or prevent" it. *Id.* at 65a (quoting *Crawford*, 50 F.3d at 51 (quoting *Webster's Third New International Dictionary* 58 (1971))). Under that standard, an owner's "bare instruction" to his agents not to sore the horse, by itself, will not relieve the owner of statutory liability for allowing the horse to be entered or shown in a sore condition, even if the owner did not have actual knowledge of that action. *Id.* at 68a (quoting *Crawford*, 50 F.3d at 52).

The Judicial Officer accordingly affirmed the finding of a violation and the imposition of a $2200 fine. Pet. App. 17a, 109a, 111a. In addition, the Judicial Officer imposed the further sanction of a one-year period of disqualification "from showing, exhibiting, or entering any horse * * * and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction." *Id.* at 111a.

The Judicial Officer denied petitioner's request for reconsideration. See Order Denying Petition for Reconsideration, HPA Docket No. 99-0020 (June 20, 2002). In that denial, the Judicial Officer reiterated the applicability of the standard articulated in *Crawford*, noting that *Crawford* upheld as reasonable the USDA's position, which "merely holds the owner responsible for the actions of her agents (*particularly the trainer*) and will not permit the owner to escape liability by testifying that she instructed a *trainer* not to sore." *Id.* at 30 (quoting *Crawford*, 50 F.3d at 51) (emphasis added by Judicial Officer). The Judicial Officer also specifically

found that "Ronal Young served as [petitioner's] agent," because petitioner "authorized Ronal Young to act for and in place of [petitioner] with respect to the boarding, training, and showing of Missy." *Id.* at 30-31. The Judicial Officer subsequently stayed implementation of the order pending appeal. See Stay Order, HPA Docket No. 99-0020 (July 17, 2002).

4. The court of appeals affirmed. Pet. App. 1a-14a. The court noted that "the decisive question is *what* must the owner allow if he is to be liable" under 15 U.S.C. 1824(2)(D) for "allowing any activity described in [15 U.S.C. 1824(2)(A), (B) or (C)] respecting a horse which is sore." Pet. App. 6a. The court understood USDA's reading of the statute to require that "the owner need only allow the entry of the horse in a show, the sale of the horse, etc.," and "[t]he owner need have no knowledge of the horse's being sore, nor need the owner bear any fault with respect to the soring." *Ibid.* The court labeled this "the 'simply-allowing' interpretation." *Ibid.* The court also articulated what it believed to be the alternative reading of the statute: "that the owner must allow not just the entry of a horse, but the entry of a *sore* horse." *Ibid.* The court labeled this the "'allowing-plus' interpretation[]." *Id.* at 6a-7a. The court recognized that, within this interpretation, there were a variety of possible meanings of the "plus" factor, ranging from actual knowledge by the owner that the horse was sore to mere failure by the owner "to take reasonable steps to prevent the horse from being entered when sore." *Id.* at 6a.

Because "the USDA is charged with administering the HPA, and * * * it has consistently interpreted § 1824(2)(D) in the context of formal adjudication," the court concluded that USDA's construction of the statute is entitled to deference as long as it is reason-

able. *Id.* at 7a (citing *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002); *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001); and *Crawford*, 50 F.3d at 50-52). The court of appeals then concluded that USDA's interpretation, as the court understood it, is supported by the text of the statute.

To reach that conclusion, the court focused on the phrase "respecting a horse which is sore" in clause (D). The court reasoned that if the "activity" "described in clause (A), (B), or (C)" that an owner is liable under clause (D) for "allowing" is the showing, entry, or sale of a *sore* horse, then the words "respecting a horse which is sore" in clause (D) would be rendered superfluous, because clauses (A), (B) and (C) themselves already include the language "any horse which is sore." Pet. App. 7a-10a. For that reason, the court concluded that the reference to "activity" in clause (D) could reasonably be interpreted to mean that "the owner must 'allow' * * * merely the showing or exhibiting of the horse." *Id.* at 9a-10a. The court, therefore, concluded that "the USDA could reasonably read the statute to say that if a sore horse is entered in a show, etc., the owner is liable simply for allowing it to be entered, regardless of whether the owner is implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring." *Id.* at 10a. Applying that test, the court upheld petitioner's liability after concluding that there was substantial evidence to support the Judicial Officer's finding that the trainer had authority from petitioner to enter Missy in the show. *Id.* at 11a-12a.

The court explained that, while "[i]n essence, it imposes on the owner a nondelegable duty not to engage in the practice of soring," that "may be justified as a prophylactic measure necessary to ensure that trainers

have no incentive to sore their horses." Pet. App. 11a (citing *Crawford*, 50 F.3d at 51-52). The court recognized, however, that "[o]f course, when an owner can convince the USDA of his or her efforts to prevent soring, the agency may decide to impose only a light sanction or none at all." *Ibid.* (citing 15 U.S.C. 1825(b)(1), which requires the Secretary, in determining the amount of civil penalties, to take into account "the nature, circumstances, extent, and gravity of the prohibited conduct," and the "degree of culpability" of the person found to have engaged in it).[3]

Judge Kelly dissented. Pet. App. 13a-14a. He took issue with the majority's focus upon the "respecting a horse which is sore" language in clause (D) and instead would have focused upon the meaning of the word "allow." *Id.* at 13a. He read the majority's opinion as rejecting an interpretation of clause (D) that would "require the USDA to prove that the owner is somehow responsible for the soring, either by authorizing, condoning, or remaining deliberately ignorant about it." *Ibid.* (citing *Lewis* v. *Secretary of Agriculture*, 73 F.3d 312, 315-316 (11th Cir. 1996); *Baird* v. *USDA*, 39 F.3d 131, 136 (6th Cir. 1994); and *Burton* v. *USDA*, 683 F.2d 280, 282-283 (8th Cir. 1982)). Judge Kelly would have defined "allow" as "'[t]o praise, commend, approve of,' or '[t]o admit the realization of, permit.'" *Id.* at 14a (quoting 1 *Oxford English Dictionary* 345 (2d ed. 1989)). Applying that definition, Judge Kelly would

---

[3] See also 15 U.S.C. 1825(b)(4) ("The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection."). Only a person who has been assessed a civil penalty is subject to the additional sanction of suspension, and even then suspension is not required. 15 U.S.C. 1825(c).

have found petitioner not liable based on petitioner's non-pretextual instruction to his trainer not to sore Missy and petitioner's unannounced visits to check on the horse. *Ibid.*

The court of appeals denied a petition for rehearing or rehearing en banc, with no judge requesting a polling of the court on the question of en banc. Pet. App. 132a-133a.

ARGUMENT

The USDA Judicial Officer reasonably found petitioner liable under the HPA. Since the passage of the HPA more than 30 years ago, this is only the seventh case involving owner liability under Section 1824(2)(D) to reach a court of appeals on petition for direct review under the Act, see 15 U.S.C. 1825(b)(2). The court of appeals' decision in this case presents no issue warranting this Court's review.

1. a. Petitioner contends (Pet. 6-9) that the decision below endorses what he characterizes as USDA's "strict liability" interpretation of owner liability under 15 U.S.C. 1824(2)(D), an interpretation that has been rejected by other courts of appeals. *Ibid.* Petitioner's assertion regarding USDA's position is incorrect. USDA interprets Section 1824(2)(D) to impose liability under the standard approved by the D.C. Circuit in *Crawford*, which creates a strong, but rebuttable presumption, of owner responsibility. That is the standard applied by the Judicial Officer in this case, Pet. App. 63a-68a, and the one USDA argued to the court below. Gov't C.A. Br. 20-24 & n.8.

In *Crawford*, the D.C. Circuit interpreted the term "allowing" in Section 1824(2)(D) not to be "functionally equivalent to the imposition of absolute liability" whenever an owner allows the entry, show, or sale of a horse

that turns out to be sore. 50 F.3d at 51. Instead, the court explained, "[t]he Department merely holds the owner responsible for the actions of her agents (particularly the trainer) and will not permit the owner to escape liability by testifying that she instructed a trainer not to sore." *Ibid.* That interpretation reasonably conforms to a standard dictionary definition of "allow": "to permit by neglecting to restrain or prevent." *Id.* at 50-51 (citing *Webster's Third New International Dictionary* 58 (1971)). After all, as the D.C. Circuit observed, "Congress did not state that an owner is liable if she *authorizes* or *causes* a horse to be sored"—"[t]he word 'allow' is a good deal softer, more passive." *Id.* at 50.[4] Thus, even where an owner does not know the horse is sore, "if an owner enters or shows a sore horse, the Department assumes that he or she has not *prevented* someone in his or her employ from soring the horse." *Id.* at 51. "And, *by itself*, testimony that the owner 'instructed' the trainer not to sore the horse will not exculpate the owner. In so concluding, the Department merely takes into account the obvious proposition that the owner has the power to control his or her agents." *Ibid.*

Nevertheless, as the D.C. Circuit further explained in *Crawford*, an owner may be able to rebut the presumption of liability by, for example, showing "that a horse was sored by a stranger or someone not

---

[4] The *Crawford* court noted that "allow" has a range of meanings (including "to make a possibility: provide opportunity or basis" or, more narrowly, "to intend or plan," *Webster's Third New International Dictionary*, *supra*, at 58), but it concluded that the interpretation chosen by USDA is not unreasonable, and is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Crawford*, 50 F.3d at 50-51.

under the owner's control," or that the trainer "flatly disobey[ed]" the owner's instruction and was consequently fired, or other circumstances under which "it might well be that the Department could not conclude reasonably that the owner 'allowed' the entry of a sore horse." 50 F.3d at 51. But "an owner can and must do a good deal more than simply give the bare instruction to be thought to have 'prevented' her own horse from being entered in a sore condition." *Id.* at 52. That is so because such an instruction, "even were it deemed totally sincere, is not necessarily inconsistent with the proposition that the owner 'permitted'—for example, through neglect or lack of vigilance—the horse to be sored." *Id.* at 51-52.

Read in this way, the Act creates a presumption of owner responsibility that may be rebutted depending upon the weight of the evidence of the owner's efforts to prevent the soring. See *Crawford*, 50 F.3d at 52 (noting that relief from liability turns on "the weight the Department must give to evidence of the owner's instruction"). That approach is consistent with other presumptions established by the statute, such as the core presumption that a horse "shall be presumed to be a horse which is sore" in violation of the HPA "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. 1825(d)(5); see also H.R. Rep. No. 1174, *supra*, at 2 (noting elimination of "the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait"); *id.* at 9 (modifying criminal liability standard from a "willful" standard to one involving knowledge, so as not to require proof that "an individual actually engaged in an act which caused a horse to become sore").

USDA's Horse Protection Program Operating Plan (Operating Plan), discussed by petitioner (Pet. 10-12), is consistent with this interpretation. Since 1999 (the year following the violation at issue here), USDA has issued an Operating Plan setting out the terms under which a qualified Horse Industry Organization may undertake responsibility, in cooperation with APHIS, to enforce the HPA. See Pet. App. 124a-126a (setting forth relevant provisions of the 1999 Operating Plan); USDA, *Horse Protection Operating Plan* 25-26 (2004-2006) (setting forth same provisions under current Operating Plan) <http://www.aphis.usda.gov/ac/hpainfo.html>.[5] In the section addressing sanctions for violations, the Operating Plan states that 15 U.S.C. 1824(2)(D) "contains a limited exemption from liability for a horse owner who demonstrates that he or she did not 'allow' the horse to be entered or exhibited in a show while sore." See Pet. App. 124a. The Operating Plan explains that the exemption "applies only to those owners who themselves did not participate in the entry, exhibition, sale, or auction of a sore horse." *Id.* at 124a-125a. The Operating Plan then sets forth a non-exhaustive list of affirmative steps that an owner can take in an effort to avoid liability under the Act, including written instructions to, and written acknowledgment by, the trainer that the horse is not to be sored, and unannounced visits to the trainer's facility by the owner and by an independent, licensed veterinarian. See *id.* at 125a-126a.

---

[5] "*Horse Industry Organization or Association* means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse." 9 C.F.R. 11.1.

The Operating Plan reflects USDA's interpretation of owner liability under 15 U.S.C. 1824(2)(D), as set forth in *Crawford* and maintained by USDA throughout this case. See Pet. App. 68a, 106a. USDA has consistently required a convincing showing that an owner took substantial steps beyond a bare oral instruction to the trainer not to sore a horse, or occasional unannounced visits. Cf. *Lewis* v. *Secretary of Agriculture*, 73 F.3d 312, 316 (11th Cir. 1996) (noting that the "Department urges this court to adopt the reasoning of * * * *Crawford*").

b. As the court of appeals in this case correctly recognized, see Pet. App. 7a, USDA's interpretation is entitled to deference. *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002). Like the D.C. Circuit in *Crawford*, the court of appeals found it appropriate for USDA to "be skeptical of self-serving testimony" about owners' instructions to trainers, and found it reasonable to place the burden on owners "as a prophylactic measure necessary to ensure that trainers have no incentive to sore their horses." Pet. App. 11a (citing *Crawford*, 50 F.3d at 51-52). The court of appeals appears to have misunderstood USDA's position, however, in further stating "USDA could reasonably read the statute" to impose owner liability "simply for allowing [the horse] to be entered, regardless of whether the owner is implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring." *Id.* at 10a. Even so, the court pointed out that "when an owner can convince the USDA of his or her efforts to prevent soring, the agency may decide to impose only a light sanction or none at all." *Id.* at 11a (citing 15 U.S.C. 1825(b)(1)). As explained above, USDA's position under *Crawford* is that it would not impose sanctions—indeed would not find a violation—if the owner made

the requisite showing of such efforts. In this case, the USDA Judicial Officer concluded that petitioner had not made the necessary showing under *Crawford*, Pet. App. 69a, and petitioner does not challenge that determination here.

Thus, although the court of appeals used a formulation not used by USDA, its ultimate conclusion was the same: USDA reasonably may impose liability on an owner for allowing the showing, entry, or sale of a horse that turns out to be sore, absent a convincing showing by the owner of sufficient affirmative efforts to prevent the soring. To the extent the court below may have articulated a stricter standard of liability than that applied by USDA in its administrative enforcement proceedings, that aspect of the court's opinion would not warrant review by this Court. USDA has responsibility for conducting administrative adjudications under the Act, and it will continue—in the Tenth Circuit and elsewhere—its longstanding policy of applying the standard set forth in *Crawford* and its own Operating Plan.

2. The decision below does not squarely conflict with the decisions of other courts of appeals construing the owner liability provision of the HPA. See *Burton* v. *USDA*, 683 F.2d 280, 282-283 (8th Cir. 1982); *Lewis*, 73 F.3d at 315-316; *Baird* v. *USDA*, 39 F.3d 131, 135-138 (6th Cir. 1994); see also *Stamper* v. *Secretary of Agriculture*, 722 F.2d 1483, 1487-1489 (9th Cir. 1984). While some of those decisions mischaracterize USDA's interpretation of the statute as imposing "strict" or "absolute" liability, see *Burton*, 683 F.2d at 282; *Lewis*, 73 F.3d at 315 (citing *Burton*); *Baird*, 39 F.3d 137 n.10; cf. *Crawford*, 50 F.3d at 51 (disagreeing with that mischaracterization), each holds—in accordance with USDA's position—that, to escape liability, an owner

must take meaningful affirmative steps to discharge his own responsibility to prevent soring.

Thus, to avoid liability for "allowing" the entry of a sore horse, the Eighth Circuit requires an owner to show not only that he had no knowledge that the horse was sore and that he instructed his trainer not to sore the horse, but also that a DQP "examined and approved the horse before entering the ring." *Burton*, 683 F.2d at 283. The Eleventh Circuit has articulated a similar approach, while emphasizing that the owner's efforts to prevent his trainer from soring the horse must be "meaningful rather than purely formal or ritualistic." *Lewis*, 73 F.3d at 317. The owner might satisfy this requirement by showing that he gave "firm and certain and suitably repeated directions not to sore and not to show a horse that is in sore condition"; that he "maintain[ed] a training environment that discourages soring or makes it impossible"; or that he "carr[ied] out inspection practices that tend to reveal any efforts to sore." *Ibid.* "But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion." *Ibid.* See also *Stamper*, 722 F.2d at 1489 (assuming *Burton* test applies, failure to meet all three factors prevents an owner from escaping liability). Finally, the Sixth Circuit, which reads *Burton* as "enumerating a set of relevant factors to consider," *Baird*, 39 F.3d at 136-137, rather than "as constituting a hard-and-fast test," *id.* at 136, recognizes that an owner can be liable for indirectly "allowing" the showing of a sore horse—"*e.g.*, by failing to prevent such conduct or act," *id.* at 137. Thus, in the Sixth Circuit, an owner must "offer evidence that he took an affirmative step in an effort to

prevent the soring that occurred." *Ibid.*[6] In short, the courts of appeals—like USDA—recognize that whether an owner has unlawfully "allow[ed]" the showing of a sore horse is a highly contextual inquiry that turns on the facts of each case and the particular actions (and inactions) of the individual owner involved.

Petitioner's contention that he should not be held liable under the HPA also is not supported by the underlying fact patterns in the cases he cites. As petitioner appears to recognize (Pet. 8), petitioner cannot escape liability under the factors identified in *Burton* or *Lewis* because the DQPs who examined his horse for the show disqualified her. Pet. App. 53a. And in *Baird*, the owner did more than merely give his trainers an instruction not to sore: the court relied on his testimony that he "would take horses away from trainers he suspected of contravening his directive." 39 F.3d at 138; *Crawford*, 50 F.3d at 51 n.5 (noting that in *Baird* it "was at least shown that the owner had taken horses away from trainers engaged in soring"). Petitioner's actions here are more similar to those of the owner in *Crawford*, in which the D.C. Circuit affirmed USDA's

---

[6] In *Baird*, the Sixth Circuit also articulated a burden-shifting approach, under which the government must refute, or prove pretextual, an owner's claims of affirmative steps to prevent soring. 39 F.3d at 137. This burden-shifting approach has not been followed by any other court of appeals. See *Lewis*, 73 F.3d at 316 ("[W]e can find no support in the Act for a burden-shifting test."); *Crawford*, 50 F.3d at 51-52. The Sixth Circuit has not had occasion to address these criticisms of *Baird* in the ten years since that case was decided, and it may decide to revisit its burden-shifting approach if the issue is presented to it again. In any event, this subsidiary issue of burden-shifting under a statutory scheme in which all courts agree that an owner must take meaningful affirmative steps to prevent the showing of a sored horse presents no issue warranting review by this Court.

finding of liability. There, although the owner—like petitioner—had instructed her trainer not to sore, the owner had paid the entry fee and intended to ride the horse in the show at issue. *Crawford*, 50 F.3d at 48. Here, although petitioner orally instructed his trainer not to sore Missy, he housed the horse with a trainer hundreds of miles from his home and place of business, Pet. App. 52a, otherwise provided no instructions as to her training, *id.* at 55a, and permitted the trainer to enter the horse in shows without his prior knowledge or oversight, including the show at issue, *id.* at 60a. The only step petitioner took in addition to his bare oral instruction not to sore—his unannounced visits to Missy—the Judicial Officer found as fact were not enough to prevent soring. *Id.* at 96a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
WENDY M. KEATS
Attorneys

AUGUST 2004